

Members

Sen. Michael Young, Chairperson
Sen. Joseph Zakas
Sen. Richard Young
Sen. Lindel Hume
Rep. Scott Pelath
Rep. Dennie Oxley
Rep. Phil Hinkle
Rep. Michael Murphy



ADMINISTRATIVE RULES OVERSIGHT COMMITTEE

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Authority: IC 2-5-18

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MEETING MINUTES¹

Meeting Date: October 13, 2008
Meeting Time: 10:30 A.M.
Meeting Place: State House, 200 W. Washington
St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 2

Members Present: Sen. Michael Young, Chairperson; Sen. Joseph Zakas; Sen. Richard Young; Sen. Lindel Hume; Rep. Phil Hinkle; Rep. Michael Murphy; .

Members Absent: Rep. Scott Pelath; Rep. Dennie Oxley.

Senator R. Michael Young, Chairman of the Committee, called the meeting to order at 10:35 a.m. Committee members then introduced themselves and indicated the districts they serve.

Chairman Young¹ announced that the meeting had been convened to allow the Committee to consider two issues: (1) whether all commissions created solely to review state agency decisions can be replaced with an "office of appeal" staffed by administrative law judges; and (2) whether the Natural Resources Commission (Commission) had exceeded its

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

¹In these minutes, Senator R. Michael Young will be referred to as "Chairman Young," and Senator Richard Young will be referred to as "Senator Young."

statutory authority in adopting a rule concerning the taking of coyotes, as alleged in a complaint filed with the Committee. Noting that the complainant and interested citizens had traveled to attend the meeting, Chairman Young stated that the Committee would first consider the complaint filed with the Committee. He then invited the complainant, Gordon Ingle, to address the Committee and noted that Mr. Ingle was one of Senator Richard Young's constituents.

Complaint concerning Commission's adoption of rule:²

(1) Testimony from Gordon Ingle:

Mr. Ingle introduced himself as an attorney and a farmer of 83 acres in Harrison County. Mr. Ingle stated his belief that in adopting LSA #07-749(F),³ the Commission had exceeded its statutory authority to adopt rules regulating wild animals in Indiana.

In adopting LSA #07-749(F), the Commission amended an existing administrative rule, 312 IAC 9-3-12(d), concerning the "taking" of coyotes. Before being amended by the Commission, 312 IAC 9-3-12(d) had simply been a restatement of a statute first enacted by the legislature in 1987 and now codified at IC 14-22-6-12. Before its amendment, 312 IAC 9-3-12(d) had provided that "a person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time."⁴ While the Commission's rule retained this language, it incorporated additional language that: (1) provides that a coyote taken on land by the person who possesses the land (or by another person designated in writing by that person) must be euthanized within 24 hours, if the coyote is taken from March 16 through October 14; and (2) places certain restrictions on the possession and disposition of such a coyote.⁵

²See Exhibit 1.

³LSA #07-749(F) was approved by the Governor and filed with the publisher of the Indiana Register and Indiana Administrative Code on July 31, 2008. DIN: 20080827-IR-312070749FRA (accessible at: <http://www.in.gov/legislative/iac/20080827-IR-312070749FRA.xml.html>).

⁴IC 14-22-6-12 similarly provides:

A person:

- (1) who possesses land; or
 - (2) designated in writing by a person who possesses land;
- may take coyotes on the land at any time.

⁵As amended, 312 IAC 9-3-12(d) provides as follows:

(d) A person who possesses land, or another person designated in writing by that person, may take coyotes on that land at any time. **A coyote taken under this subsection from March 16 through October 14:**

- (1) must be euthanized within twenty-four (24) hours of capture; and**
- (2) shall not be:**

Claiming that the Commission had exceeded its authority in adopting these changes, Mr. Ingle argued that the General Assembly had intended to establish an "open season" on coyotes when it passed IC 14-22-6-12. According to Mr. Ingle, in placing restrictions on the possession and disposition of a coyote taken from March 16 through October 14, the Commission had thwarted the General Assembly's intent to allow a person who possesses land to take coyotes on that land "at any time."

Mr. Ingle explained that he had become aware of Commission's rule when two of his beagles were attacked by coyotes that had entered his property; one of the beagles survived, the other did not. In his subsequent efforts to hire a trapper to come onto his property to set traps for the coyotes, he was unable to find one who was willing to take the job. He was told by several of the trappers that they could make little money by selling the pelts of the coyotes they trapped, and that given what was at the time the Commission's proposed rule to restrict the sale or trade of coyotes taken from March 16 through October 14, there was uncertainty as to whether the coyotes they trapped could be sold or traded at all.

Representative Hinkle pointed out that the statutory definition of "take"⁶ seems to focus on the actual killing or capturing of a wild animal and does not mention what can or cannot be done with an animal once it is taken. Given this limited definition, he asked Mr. Ingle how the Commission's rule had interfered with the right of a person who possesses land to take coyotes on that land.

While acknowledging that the statutory definition of "take" does not specifically include the actions prohibited by the Commission's rule, Mr. Ingle argued that the effect of the rule was to essentially limit a person's ability to take a coyote during the period specified in the rule by placing restrictions on what can be done with a coyote once it is taken.

Chairman Young asked Mr. Ingle whether he was familiar with IC 14-22-2-6, which requires the Director of the Department of Natural Resources (DNR) to adopt various rules to regulate and manage wild animals and exotic mammals in Indiana.⁷ Mr. Ingle

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- (A) possessed for more than twenty-four (24) hours;**
 - (B) sold;**
 - (C) traded;**
 - (D) bartered; or**
 - (E) gifted.**

(Roman text indicates text in 312 IAC 9-3-12(d) before its amendment. Bold text indicates language added to 312 IAC 9-3-12(d) after its amendment by LSA #07-749(F).)

⁶IC 14-22-2-278 provides that for purposes of IC 14-22-2, "take" means: "(A) to kill, shoot, spear, gig, catch, trap, harm, harass, or pursue a wild animal; or (B) to attempt to engage in such conduct."

⁷IC 14-22-2-6(a)(4) provides that the Director of the DNR shall adopt rules under IC 4-22-2 to "[e]stablish the method, means, and time of: (A) taking, chasing, transporting, and selling; or (B) attempting to take, transport, or sell; wild animals or exotic mammals, with or without dogs, in Indiana or in a designated part of Indiana." Although this authority is bestowed upon the Director of DNR, IC 14-10-2-4(c) provides that "whenever the department or the

responded that he was familiar with the statute but believed that the DNR's rulemaking authority under it was "trumped" by the General Assembly's enactment of IC 14-22-6-12, because IC 14-22-6-12 was a more specific statute.

(2) Testimony from John Davis:

Following Mr. Ingle's testimony, Chairman Young asked John Davis, Deputy Director of the DNR, to address the Committee. Mr. Davis explained that the DNR's Division of Fish and Wildlife had proposed the rule which was eventually adopted by the Commission. He noted that the rule as adopted does not alter the season for hunting or trapping coyotes, which is still from noon on October 15 until noon on March 15 of the following year (or at any time by the person who possesses the land on which the coyote is taken). Rather, the amendment concerns the possession of coyotes that are taken outside of the hunting and trapping season.

When asked by Chairman Young what the impetus for the amendment was, Mr. Davis reported that the DNR had been contacted by natural resource agencies in several other states about the problems that occur when coyotes are shipped across state lines. For example, Mr. Davis noted that coyotes that are trapped and transported live to another location have the potential to spread diseases such as mange, distemper, parvovirus, rabies, and heartworm. These diseases can infect coyote populations, other animals, and humans in the second state.

Addressing Mr. Ingle's contention that the Commission had exceeded its statutory authority in adopting the rule, Mr. Davis stated that he disagreed with Mr. Ingle's assertion that the DNR's rulemaking authority granted under IC 14-22-2-6 was superseded by the General Assembly's enactment of IC 14-22-6-12.

(3) Testimony from Colonel Michael Crider:

Mr. Davis then introduced Colonel Michael Crider, Director of Law Enforcement for the DNR. Colonel Crider stressed the seriousness of the potential for the spread of disease when coyotes are transported across state lines. While the importation of live coyotes into Indiana⁸ and many other states is illegal or restricted because of these disease concerns, there is an incentive for individuals to sell live coyotes in violation of these laws and regulations because of the monetary value placed on live coyotes. Colonel Crider explained that live coyotes are often sold across state lines for use in running enclosures that are part of dog training facilities. Because there is no "fair chase" within these enclosures, some coyotes are not just chased but killed by dogs within the enclosures. There is also the potential for coyotes to escape from the enclosures, creating problems for nearby landowners. He acknowledged that such enclosures are currently operating illegally outside the coyote season in Indiana.

Representative Murphy asked Colonel Crider why the Commission has not just adopted a rule to prohibit the transportation of coyotes across state lines, if that was indeed the policy behind the amendment. He further suggested that the Committee could recommend that

director has the authority to adopt rules under IC 4-22-2, the commission shall exclusively exercise the authority."

⁸Indiana places limits on the importation of live coyotes into the state by requiring that an application for a game breeder's license must be applied for within five days after the importation of a coyote into Indiana. 312 IAC 9-10-4(b).

the Commission repeal the current rule and adopt a rule to do just that.

While cautioning that he could not speak as to the Commission's policy motivations, Colonel Crider stated that he believed that the rule did, in fact, prohibit the transportation of live coyotes outside Indiana.

Senator Young then commented that he had been a member of the standing committee that had considered the legislation that is now codified at IC 14-22-6-12 and that allows a person who possesses land to take coyotes on that land at any time. According to Senator Young, the intention of the committee, and eventually the legislature, in approving this provision was to create an "open season" for the hunting or trapping of coyotes. Noting that he has supported recent legislation to restrict "canned hunting" operations in Indiana, Senator Young indicated that he was sympathetic to the DNR's desire to prevent coyotes that are transported across state lines from ending up in dog training enclosures. Nevertheless, he expressed his opinion that Commission had "circumvented the law" in adopting a rule that essentially nullified the legislature's attempt to establish an open season for the taking of coyotes.

Senator Hume stated that he did not necessarily think the Commission had circumvented the law by adopting the rule at issue. He cautioned that the adoption of a rule to expressly restrict the transportation or sale of coyotes across state lines, as recommended by Representative Murphy, could be considered an interference with interstate commerce and challenged on constitutional grounds.

(4) Testimony from Tim Maloney:

The Committee then heard from Tim Maloney, Senior Policy Director for the Hoosier Environmental Council. Mr. Maloney expressed the Hoosier Environmental Council's support for the Commission's adoption of LSA #07-749(F) and for the responsible regulation of wildlife in general. Mr. Maloney suggested that because the issue addressed by the rule involves the appropriateness of trading in wild animals, the Commission did not exceed its authority in adopting the rule.

(5) Discussion by Committee members:

Following public testimony on the rule, Committee members discussed their possible recommendations on the issue. Representative Hinkle stated his belief that the legislature had intended to establish an open season for the taking of coyotes, and that the Commission had "overstepped its bounds" in adopting a rule that had, in effect, thwarted this intention. Senator Young concurred in this conclusion.

Senator Zakas noted the absence of the language "notwithstanding any other law" in IC 14-22-6-12, the statute that had apparently established the open season on coyotes. He suggested that without such language, the DNR's broad rulemaking authority under IC 14-22-2-6 was not limited or superseded by IC 14-22-6-12. Accordingly, he suggested that the Commission did, in fact, have the authority to take the action that it did.

Representative Hinkle suggested that the Committee recommend legislation directing the Commission to: (1) repeal the disputed rule; and (2) adopt a new rule prohibiting the transportation of coyotes across state lines from March 16 through October 14.

Senator Young argued that the issue should instead come before the legislature, rather than go through the agency rulemaking process again. He recommended a bill that would: (1) void the Commission's rule; and (2) assign the issue of the taking and transporting of

coyotes to the Natural Resources Study Committee during the 2009 interim. That study committee could in turn recommend any necessary legislation to the full General Assembly.

Representative Murphy argued that the problems caused by the transportation of coyotes across state lines were too urgent to wait until the 2009 interim to consider the appropriate response. He expressed support for the legislation proposed by Representative Hinkle.

After further discussion among Committee members, Chairman Young asked staff to prepare a bill draft that would: (1) void the portion of the rule amended by the Commission (i.e., 312 IAC 9-3-12(d)); and (2) add a provision to the Indiana Code itself to prohibit the transportation of coyotes across state lines from March 16 through October 14. Chairman Young indicated that the Committee would consider the draft, along with the Committee's final report, at the Committee's next meeting on October 17, 2008.

Creation of centralized "office of appeal" to consider state agency decisions:⁹

Chairman Young asked Senator Young to explain his reasons for bringing before the Committee the issue of whether the state's current framework for administrative adjudication should be replaced with an "office of appeal" staffed by administrative law judges (ALJs). Chairman Young noted that under the state's current system, state agency decisions are reviewed by the agency's own administrative law judges (ALJs) or, in some cases, by offices staffed with ALJs who hear cases involving a particular subject area, such as in the area of environmental law.

Senator Young explained that someone had brought the issue to his attention a while ago. Although he could not remember who had done so, Senator Young had agreed that it was an idea worth exploring and had asked his staff to research the experience of other states that use centralized panels of ALJs. This research revealed that over 20 states currently have centralized appeals offices, often in the form of an independent agency within the executive branch of state government. Senator Young reported that the policy behind creating a free-standing appeals office is to ensure the fairness of administrative adjudications by structurally removing the adjudicator from the agency involved in the proceeding. This separation reduces the risk that an ALJ will be subject to ex parte influence by the agency whose decision is being appealed.

Chairman Young acknowledged that a centralized panel may indeed help to inspire confidence in the public that the administrative adjudication process is unbiased. However, he expressed concern that ALJs serving on a centralized panel would lack the technical expertise developed by ALJs housed within a particular agency or hearing appeals involving a certain subject matter. Chairman Young then invited Amy Romig to address the Committee.

(1) Testimony from Amy Romig:

Ms. Romig introduced herself as an attorney at the Indianapolis firm of Plews Shadley Racher & Braun. She explained that she was testifying on behalf of the Environmental Law Section of the Indiana State Bar Association and as an attorney who often represents

⁹See Exhibit 2.

clients before the Office of Environmental Adjudication (OEA).¹⁰ Ms. Romig expressed concern about any action the General Assembly might take to replace existing adjudicatory bodies such as the OEA and the Natural Resources Commission's Division of Hearings with a centralized appeals office. Ms. Romig suggested that ALJs drawn from a centralized panel would lack the subject-matter expertise that the "environmental law judges" (ELJs) who currently staff the OEA possess.

Ms. Romig also expressed concern that the establishment of a centralized appeals office would compromise the consistency of decision making within particular subject matter areas, resulting in less certainty for regulated entities and other parties to adjudicatory proceedings. Under the state's current structure, an agency's ALJs, through their collective experience, tend to reach the same result in cases that are factually similar. However, with a free-standing appeals office, an agency is assigned an ALJ from a larger pool of ALJs. Because ALJs from the centralized panel cannot bring to a proceeding the same institutional knowledge that "in house" ALJs can, the possibility that cases with essentially the same facts will be decided differently is increased.

In concluding her testimony, Ms. Romig urged the General Assembly not to replace the state's existing administrative appeals procedures with a centralized office of administrative appeals. However, if such legislation is in fact introduced, Ms. Romig asked that lawmakers consider allowing the OEA and Natural Resources Commission's Division of Hearings to continue operating apart from the new system.

(2) Testimony from John Davis:

After Ms. Romig's testimony, Chairman Young requested that John Davis, Deputy Director of the DNR, offer his comments on the concept of a centralized office of appeals. Mr. Davis emphasized the value of the expertise provided by ALJs who hear cases from particular agencies or involving particular subject matters. Addressing concerns that ALJs associated with particular agencies may not provide independent judgment when deciding cases, he noted that the two ALJs who currently serve the Commission's Division of Hearings had not worked for the DNR before being hired as ALJs. Mr. Davis pointed out that it is not always the case that agencies hire ALJs from within their own ranks.

(3) Testimony from Mary Davidson:

Finally, the Committee heard from Mary Davidson, Chief Environmental Law Judge and Director of the Office of Environmental Adjudication. Ms. Davidson noted that she was the first person appointed to serve as an ELJ under IC 4-21.5-7. The OEA currently includes one other ELJ. According to Ms. Davidson, IC 4-21.5-7 ensures that ELJs are selected by a fair and neutral process and that they meet certain qualifications. For example, under IC 4-21.5-7-4, the governor appoints the Director from among three candidates who are nominated by a panel consisting of four members, not more than two of whom may be affiliated with the same political party.¹¹ Under IC 4-21.5-7-5, an ELJ must: (1) be an

¹⁰The Office of Environmental Adjudication was established by IC 4-21.5-7-3 to review agency actions of the Indiana Department of Environmental Management and actions of the Air Pollution Control Board, the Water Pollution Control Board, and the Solid Waste Management Board.

¹¹The panel consists of:

(1) one person, who serves as the chair of the panel, appointed by the Chief

attorney admitted to the Indiana bar; (2) have at least five years of experience practicing administrative or environmental law in Indiana; (3) be independent of the Indiana Department of Environmental Management (IDEM); and (4) be subject to all provisions of the Indiana Administrative Orders and Procedures Act (IC 4-21.5) that apply to an ALJ. Ms. Davis pointed out that IC 4-21.5-7-5 further provides that ELJs are subject to the Code of Judicial Conduct.

In addition to emphasizing the qualifications and impartiality of ELJs, Ms. Davidson provided anecdotal accounts of her discussions with ALJs in other states that have adopted centralized appeals panels. In attending conferences for administrative adjudicators across the country, Ms. Davidson has talked to ALJs from states with centralized appeals offices established within the executive branch of government. Several of these ALJs have complained that there is often pressure from the administration to reduce the number of cases heard by the appeals office in order to reduce appropriations from the state budget. This pressure, in turn, leads ALJs to schedule hearings early in the morning or at other times when parties are unlikely to attend, in order to obtain default judgments.

In addition to these anecdotal accounts, Ms. Davidson offered several other reasons why she would discourage the legislature from establishing a centralized office of appeal. She argued that the OEA and other specialized adjudicatory divisions can offer a level of efficiency and fairness that is not possible when ALJs are drawn from a pool. She noted that consistent opinions ensure that a party in one case is not treated differently from a similarly situated party in another case. Ms. Davidson suggested that such consistency may not be possible when ALJs are assigned to cases from a centralized pool.

(4) Discussion by Committee members:

Following public testimony on the issue, Committee members discussed their recommendations on the possible creation of a centralized "office of appeal" to consider state agency decisions. Chairman Young noted that all testimony received was against such a proposal, and was, in fact, highly supportive of the state's existing system of administrative adjudication. Senator Young suggested that issue before the Committee was "a solution in need of a problem." All committee members agreed to recommend that no action be taken by the General Assembly at this time concerning the establishment of a centralized administrative appeals office.

Chairman Young instructed staff to prepare a final report for the Committee's consideration at the meeting scheduled for October 17, 2008. The report should include the Committee's recommendations on the two issues under discussion, along with the proposed bill draft to void the Commission's rule on the taking of coyotes and to prohibit the transportation of coyotes across state lines from March 16 through October 14.

Chairman Young adjourned the meeting at 12:55 p.m.

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- Justice of the Indiana Supreme Court;
 - (2) one person appointed by the Governor;
 - (3) one person appointed by the Speaker of the House of Representatives; and
 - (4) one person appointed by the President Pro Tempore of the Senate.